# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 7 |
| Appendix | 8 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Commissioner* v. *Sun Pipe Line Co.*, 126 F. 2d 888 | 6 |
| *Grant Trading Co.* v. *Commissioner*, decided May 3, 1943 | 6 |
| *Higgins* v. *Smith*, 308 U. S. 473 | 6 |
| *Interstate Transit Lines* v. *Commissioner*, decided June 14, 1943 | 6 |
| *Moline Properties, Inc.*, v. *Commissioner*, decided June 1, 1943 | 6 |
| *Phillips, B. D., Inc.*, v. *Commissioner*, 134 F. 2d 73 | 6 |
| Statute: | |
| Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 355, as amended | 5, 8 |
| Miscellaneous: | |
| Treasury Regulations 94, Art. 355-2, as amended | 8 |




546457—43

# In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 207

THE RARITAN COMPANY OF DELAWARE, INC.,
PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 3–11) is reported at 47 B. T. A. 857. The opinion of the Circuit Court of Appeals (R. 18–20) is not yet officially reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 7, 1943 (R. 21). Petition for a writ of certiorari was filed July 29, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether, in the computation of petitioner's 1937 undistributed adjusted net income for purposes of the personal holding company surtax, it is entitled to credit under Section 355 (b) of the Revenue Act of 1936, as amended, for amounts paid on a debt incurred by its wholly owned subsidiary prior to January 1, 1934, but assumed by the petitioner after that date.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 8–10.

## STATEMENT

The facts, as found in the opinion of the Board of Tax Appeals (R. 3–11), may be summarized as follows:

The petitioner is a personal holding company organized under the laws of Delaware (R. 4).

Since 1927, Johnson & Johnson, a New Jersey corporation manufacturing medical supplies, has been controlled by Robert Wood Johnson and J. Seward Johnson, the surviving sons of one of its cofounders, who together then owned slightly less than one-half of the common stock. In that year there arose between the sons and the surviving co-

founder, certain differences respecting the management policies of the business. It was thereupon agreed that the surviving cofounder should sell part of his common stock to each of the sons in order that they would jointly own the controlling interest in the business. (R. 4.) Under this agreement, J. Seward Johnson in 1927 purchased from the surviving cofounder 1,667 shares of Johnson & Johnson common, paying $541,710 therefor in cash, which he borrowed from the Chase National Bank (R. 4–5).

The petitioner was organized on March 31, 1932, pursuant to a plan whereby all or most of the dividends regularly paid on Johnson & Johnson stock would be available for reducing the bank loan, no part of which had as yet been retired. Petitioner's entire 500 shares of capital stock were issued to J. Seward Johnson in exchange for 30,000 shares of Johnson & Johnson common. Shortly thereafter The Raritan Company, Limited (hereinafter called Newfoundland), was incorporated under the laws of Newfoundland, and it acquired from petitioner in exchange for all of its capital stock these 30,000 shares of Johnson & Johnson common. This arrangement, whereby petitioner owned all of Newfoundland's stock, was designed to free the latter from tax liability under Section 104 of the Revenue Act of 1928 or corresponding sections of subsequent acts. (R. 5.)

At about the same time, and further in pursuance of the plan, Newfoundland purchased from J. Seward Johnson 4,167 shares of Johnson & Johnson common, paying $541,710 therefor in cash, with which J. Seward Johnson in turn paid the full amount of his 1927 loan at the Chase National Bank. Newfoundland borrowed the amount paid for these shares from the Chase National Bank. The loan was evidenced by Newfoundland's secured, interest-bearing demand note dated May 19, 1932. (R. 5–6.)

In December of 1936 Newfoundland was liquidated and dissolved in accordance with the provisions of Section 112 (b) (6) of the Revenue Act of 1936, and with the prior consent of the Commissioner, as required by Section 112 (i) of the same Act. All of Newfoundland's assets, subject to a balance of $230,000 owed on Newfoundland's debt to the Chase National Bank, were distributed in liquidation to petitioner as Newfoundland's sole stockholder. The assets thus received consisted of Johnson & Johnson common stock and a small amount of cash. (R. 6.)

All payments made on the note prior to 1937 were made by Newfoundland. The petitioner paid $25,000 on the note on March 2, 1937, $1,500 in 1938, and the balance in 1939. (R. 6.)

The Board of Tax Appeals sustained the Commissioner's determination that payments made by

the petitioner in 1937 were not deductible from adjusted net income in the computation of its undistributed adjusted net income for the purposes of the personal holding company surtax under Section 355 (b) of the Revenue Act of 1936, as amended (R. 11). The court below affirmed on the ground that the petitioner in 1934 did not owe the debt for the payment of which it now seeks deduction for 1937, and that the separate corporate existence of itself and its subsidiary could not be disregarded so as to hold the subsidiary's debt a debt incurred by the petitioner prior to the critical date (R. 20).

## ARGUMENT

This case does not call for further review. The decision below is correct, and there is no conflict.

Section 355 (b) of the Revenue Act of 1936, as amended (Appendix, *infra*, p. 8), expressly limits the grant of credit to personal holding companies for debt retirement to the retirement of "indebtedness * * * incurred prior to January 1, 1934." Petitioner did not incur the debt on which its claim to credit is here based before January 1, 1934; petitioner had no obligation whatsoever on the note of its subsidiary to Chase National until December of 1936, when, in taking over that subsidiary's assets, it also took over the liability (R. 5–6). The subsidiary incurred the debt to the bank prior to the critical date named in the statute, but it is not the subsidiary which is now seeking the benefit of the statutory grant.

Since the debtors differed, manifestly the "indebtedness" could not be the same. True, in two circuits, including the court below, it has been held that indebtedness may qualify as antedating January 1, 1934, although there is a change in identity of *creditors* subsequent to the critical date. *B. D. Phillips, Inc.* v. *Commissioner,* 134 F. 2d 73 (C. C. A. 3); *Commissioner* v. *Sun Pipe Line Co.,* 126 F. 2d 888 (C. C. A. 3); *Grant Trading Co.* v. *Commissioner* (C. C. A. 2), decided May 3, 1943 (1943 C. C. H., par. 9419). The Government does not concede the correctness of those decisions, but even if sound, they are not applicable here. As pointed out by the court below (R. 19–20), there is obviously a vast difference between a taxpayer's continuing its own obligation with a different creditor and its assuming for the first time the obligation of another.

Nor are the debtors here the same by reason of the fact that the subsidiary obligor which incurred the debt prior to the critical date was wholly owned by the petitioner. Each was a distinct corporate entity, deliberately so established at a time when that best served petitioner's purpose (R. 5). The separation is not to be repudiated now. Cf. *Moline Properties, Inc.* v. *Commissioner,* No. 660, 1942 Term, decided June 1, 1943; *Interstate Transit Lines* v. *Commissioner,* No. 552, 1942 Term, decided June 14, 1943; *Higgins* v. *Smith,* 308 U. S. 473.

CONCLUSION

The petition for certiorari should be denied.
Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*
SAMUEL O. CLARK, JR.,
*Assistant Attorney General.*
SEWALL KEY,
SAMUEL H. LEVY,
MARYHELEN WIGLE,
*Special Assistants to the Attorney General.*

AUGUST 1943.